ADMISSIBILITY OF TELEPHONE CONVERSATIONS. — When an ordinary conversation, held in the presence of the parties, is offered in evidence the usual questions are: is it relevant; and does it violate the Hearsay Rule. But when considering the admissibility of a telephone conversation we are immediately confronted with the question: did the witness actually speak with the party alleged. Obviously this is a question of identification — a question of fact; and much depends on the variant circumstances of the individual case, whether there is sufficient evidence to warrant this inference of identity. It is, of course, recognized that the mechanism of the telephone is sufficiently reliable so that the mere fact that the conversation was so conducted should not make it inadmissible.[1] But, on the other hand, it does not follow that since a person has placed himself in connection with a telephone system he is chargeable with every conversation purported to have been made by him.[2] Fortunately, however, there are in most cases other circumstances sufficient to establish the necessary identity. Can any generalizations be made? A very common circumstance is that the witness was acquainted with the speaker's voice, and on the occasion in question recognized the voice. This is generally sufficient.[3] But that there should be an absolute or presumption-raising criterion — a "voice test" — as some cases seem to indicate is quite unfortunate.[4] It is well known that in many cases, especially in the commercial dealings in our large cities, the voice in fact is not recognized, and yet rights and liabilities are continually being established solely on this mode of communication. To adhere to a "voice test" as a criterion of admissibility would be to place many of these transactions beyond the protection of the law. It is common experience that there are many other circumstances from which the inference of identity may be reasonably ascertained, and it is highly important that the courts should give such evidentiary matter its full weight consistent with a due regard for the interests of the party to be charged with the conversation. But to go to the other extreme and say that even though the speaker was not identified, yet the evidence should be admitted, "to be given such weight as, under the circumstances, the jury thought was proper," seems an inadvisable liberality.[5] Conceding then that the mere fact that a party calls up purporting to be B is too dangerous a circumstance to rely upon in showing identity; nevertheless, it is conceivable that circumstances preceding or following the conversation or indeed the very subject-matter may serve to establish that identity. On this, the

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[1] Shawyer *v.* Chamberlain, 113 Iowa, 742, 84 N. W. 661.

[2] See Wolfe *v.* Missouri Pac. R. Co., 97 Mo. 473, 482, 11 S. W. 49, 52. See the criticism; Rueckheim Bros. *v.* Ser Vis Co., 146 Ill. App. 607, 609; 3 WIGMORE, EVIDENCE, § 2155, note 7.

[3] Lord Electric Co. *v.* Morrill, 178 Mass. 304, 59 N. E. 807; Johnson *v.* Hernig, 49 Pa. Sup. Ct. Rep. 484.

[4] "Tanner admitted he did not recognize the voice of the person who spoke to him through the telephone . . . he could not tell whether it was Obermann's voice or not." Obermann Brewing Co. *v.* Adams, 35 Ill. App. 540, 541. See also Kimbark *v.* Illinois Car & Equipment Co., 103 Ill. App. 632, 637. In both cases there were other circumstances sufficient at least to go to the jury.

[5] Kansas City Star Co. *v.* Standard Warehouse Co., 123 Mo. App. 13, 99 S. W. 765. See 20 HARV. L. REV. 650.

cases seem to be quite generally in accord.[6] The converse situation at the outset is more reliable. Thus where A, in the ordinary course of affairs, gets B's number from the telephone directory, calls that number, and is answered by a party who purports to be B and who does in fact carry on an apparently *bonâ fide* conversation, this, in average experience, would seem to warrant an inference that in fact it was B who answered the call. Being a natural inference in ordinary experience it would seem to be a permissible inference for a jury, and therefore, it is submitted, those circumstances should be considered admissible as sufficient evidence to go to the jury on the question of identity. And there is considerable judicial support for this position.[7] Here again, of course, additional circumstances preceding or following the conversation, or the very subject-matter, may more clearly establish the identity.[8]

The case becomes more complicated, however, when the speaker does not purport to be any particular person, but merely a member of the B company, authorized to make the statement with which the B company is sought to be charged. It must be proved that A did in fact speak with someone at the B company's office, that that person had authority to make the statement; and this necessarily involves showing who that person was. Obviously it is impossible to establish this by direct evidence, and the question again becomes one of determining what circumstances are necessary to establish these inferences. We have previously considered what set of circumstances are admissible as sufficient evidence to go to the jury on the question of the speaker's identity when that speaker purports to be a particular person, and those observations are equally applicable here in determining the sufficiency of the evidence to permit an inference that A spoke with someone at the B company's office. But how are we to say that such person had the requisite authority? It seems clear that if A had gone in person to the B company to make a contract, had been referred by someone at the information desk to a person who purported to have authority to negotiate with him, and who did in fact enter into a transaction, these circumstances would be very strong evidence that A did in fact negotiate with an authorized agent of the B company, and, indeed in absence of rebutting evidence, would warrant a direction to that effect. It may

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[6] Godair *v.* Ham Nat. Bank, 225 Ill. 572, 80 N. E. 407; Rogers Grain Co. *v.* Taunton, 136 Ill. App. 533. *Cf.* Rueckheim Bros. *v.* Ser Vis Co., *supra*. See also cases in note 8.

[7] "In average experience the numbers and addresses contained in the telephone company's directory . . . are found sufficiently accurate to justify its substantial trustworthiness. When, therefore, a person so stated to live at the address, and bearing the same name as the party sought to be charged, is called for by the telephone at that number and address, and answers to the name, admitting the identity, it is to be accepted as the same evidence would be if the witness testifying had called in person and the ostensible owner had answered and admitted the identity." Holzhauer *v.* Sheeny, 127 Ky. 28, 104 S. W. 1034. See also Globe Printing Co. *v.* Stahl, 23 Mo. App. 451, 458; Guest *v.* H. & St. J. R. Co., 77 Mo. App. 258. *Cf.* Young *v.* Seattle Transfer Co., 33 Wash. 225, 74 Pac. 375 (admissibility of the telephone conversation does not seem to have been questioned). But see Planter's Cotton Oil Co. *v.* Western Union Telegraph Co., 126 Ga. 621, 55 S. E. 495; Swing *v.* Walker, 27 Pa. Sup. Ct. Rep. 366, *contra*.

[8] People *v.* McKane, 143 N. Y. 455, 33 N. E. 950 (an affidavit of defendant referred to the conversation); Davis *v.* Walter, 70 Iowa, 466, 30 N. W. 804 (testimony of co-defendant disclosed the identity); Barrett *v.* Magner, 105 Minn. 118, 117 N. W. 245 (previous personal conversation); see also cases in note 6.

perhaps be suggested that A could subsequently identify the person with whom he dealt. But this would serve only as cumulative force rather than a necessary element in establishing that he dealt with an authorized agent. We may well suppose a case where A goes to the B company, steps up to one of the numerous cashiers' windows and pays a bill to a person having apparent authority to receive money; he does not know that person, and undoubtedly could not subsequently identify him, and yet no court would hesitate to say that that was sufficient evidence to sustain a finding that payment was made to an authorized person. It would seem equally clear that if A called up the B company — it being shown to the satisfaction of the jury that the connection was in fact with the B company — and upon proper inquiry was connected with a person who purported to be a particular official, or a member of a certain department having authority to deal with the matter, and such person did in fact proceed with a transaction, these circumstances would surely be admissible as sufficient evidence to permit a finding that A was talking with a person having the requisite authority. But here again we find decisions and statements highly prejudicial to this mode of communication.[9] There is, however, considerable judicial support for the position we have indicated.[10] Here again, of course, there may be additional circumstances to show that authority.[11] If the matter of identity or authority is not in dispute, then there are simply the ordinary questions of relevancy and hearsay. If after these considerations the conversation is admissible, obviously it may be corroborated by a witness who was in the presence of one of the speakers. But generally he can testify personally only as to what he heard one of the parties say — not both, as in ordinary conversations. Granting that he may testify as to what he heard A say to B over the telephone, is it proper to permit him to testify as to what A, during the conversation or immediately thereafter, told the witness what was purported to be B's answer. It seems only reasonable that in the ordinary experiences such testimony should be allowed whether we call it part of the *res gestae* or a permissible invasion of the Hearsay Rule. And the courts are inclined to this liberality.[12]

A different problem arises where A does not talk with B but with someone who purports to speak as B's automaton repeating verbatim or in

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[9] "The sayings of that person [one who responded to the call 'Is this the Western Union' and proceeded to take the message] would not be admissible against the defendant until the fact of agency had been established," thus indicating that the court did not recognize the circumstances of the call admissible as sufficient evidence to permit a finding of the fact of agency. Planter's Cotton Oil Co. *v.* Western Union Telegraph Co., *supra*. See also Obermann Brewing Co. *v.* Adams, *supra;* Kimbark *v.* Illinois Car & Equipment Co., *supra*.

[10] "The burden was on the defendant company who had possession management and control of the telephone, to show affirmatively that the order was accepted by an unauthorized person or not accepted at all." Star Bottling Co. *v.* Cleveland Faucet Co., 128 Mo. App. 517; Rock Island & P. R. Co. *v.* Potter, 36 Ill. App. 590; Gilliland *v.* Ry. Co., 85 S. C. 26, 67 S. E. 20; Gardner *v.* Hermann, 116 Minn. 161, 133 N. W. 558.

[11] Missouri Pac. R. Co. *v.* Heidenheimer, 82 Texas, 201, 17 S. W. 608; Godair *v.* Ham Nat. Bank, *supra*.

[12] Miles *v.* Andrews, 153 Ill. 262, 38 N. E. 644; Northern Assurance Co. *v.* Morrison, 162 S. W. 411 (Texas Civ. App.); McCarthy *v.* Peach, 186 Mass. 67, 70 N. E. 1029. See also 27 HARV. L. REV. 683.

substance what B has directed him to say. This is a subject not peculiar to telephone conversations, but involves the well-known principles of interpreters as agencies of communication.[13]

RECENT CASES

AGENCY — SCOPE OF AGENT'S AUTHORITY — PRINCIPAL'S LIABILITY UNDER WORKMEN'S COMPENSATION ACT TO PERSON EMPLOYED BY AGENT TO ASSIST IN EMERGENCY. — Defendant's servant asked aid from plaintiff in getting a wagon out of the mud. In attempting to assist, plaintiff was injured. He sues under the Workmen's Compensation Act. (1913 MINN. GEN. STAT. § 8195.) *Held*, that he may recover. *State ex rel. Nienaber* v. *District Court of Ramsey County*, 165 N. W. 268 (Minn.).

An agent is justified in assuming extraordinary powers in an emergency. *Terre Haute, etc. R. Co.* v. *McMurray*, 98 Ind. 358. See STORY, AGENCY, 6 ed., § 141. His conduct must be necessary and limited to the exigencies of the case. *Gwilliam* v. *Twist*, [1895] 1 Q. B. 557, [1895] 2 Q. B. 84; *Foster* v. *Smith*, 2 Coldw. (Tenn.) 474; *Vandalia R. Co.* v. *Bryan*, 60 Ind. App. 223, 110 N. E. 218. See 29 HARV. L. REV. 547. An agent, ordinarily without authority to employ, may have such incidental power in an emergency, and it has been held that the person employed is a fellow-servant of the one by whom he is employed. *Gunderson* v. *Eastern Brewing Co.*, 71 Misc. (N. Y.) 519, 130 N. Y. Supp. 785; *Brooks* v. *Central Ste. Jeanne*, 228 U. S. 688. See F. R. Mechem, "Master's Liability to Third Persons for the Negligence of a Stranger Assisting his Servant," 3 MICH. L. REV. 198. There seems to be no reason why the person employed could not recover under the Workmen's Compensation Act. See *Paul* v. *Nikkel*, 1 Cal. I. A. C. 648, 650. It is no objection that the work was only casual. *Ginther* v. *Knickerbocker Co.*, 1 Cal. I. A. C. 458. However, the facts in the case do not seem to make the defendant an "employer" within the Minnesota statute, which defines an "employer" as one "who employs another to perform a service for hire." See 1913 MINN. GEN. STAT. § 8230. *Georgia Pacific R.* v. *Propst*, 83 Ala. 518, 3 So. 764, 85 Ala. 203, 4 So. 711. The cases have drawn a rather rough distinction between the volunteer who is acting partly to protect his own interests and the volunteer who is not, holding that the latter becomes an employee, while the former does not. *Street Ry. Co.* v. *Bolton*, 43 Ohio St. 224; *Wright* v. *London, etc. R. Co.*, 1 Q. B. D. 252; *Mayton* v. *T. & P. R.*, 63 Texas, 77.

ATTACHMENT — GROUNDS — WHETHER AN ACTION FOR FRAUD AND DECEIT IS AN ACTION "ARISING ON CONTRACT." — A statute provides that no attachment shall be granted on the ground that the defendant is a non-resident for "any claim other than a debt or demand arising upon contract." (OHIO GEN. CODE, § 11819.) The present defendant sued a non-resident "for fraud and deception" in inducing the defendant to buy certain shares of stock and attached his property. The plaintiff made a subsequent attachment of this same property, and attacked the prior attachment as not "arising on contract." *Held*, that the prior attachment prevails. *Weirick* v. *Mansfield Lumber Co.*, 117 N. E. 362 (Ohio).

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[13] Herendeen Mfg. Co. *v.* Moore, 66 N. J. L. 74, 48 Atl. 525; Sullivan *v.* Kuykendall, 82 Ky. 489; Oskamp *v.* Gadsden, 35 Nebr. 7, 52 N. W. 718. See 1 WIGMORE, EVIDENCE, § 699.